Chua Bah Bee v Ting Hiong Hwa

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–28 OF 1992
SURIYADI J
24 JANUARY 1997

Civil Procedure *— Res judicata — Issue estoppel — Whether issues which might have been and which were not brought forward before the court in a previous proceeding, though not actually decided by that court, are still covered by the doctrine of res judicata — Whether on the facts the court ought to invoke the principle of res judicata*

The plaintiff brought a civil suit against his wife ('the defendant') and applied for a declaration that six pieces of land held jointly between them or registered solely in the name of the defendant were held in trust by the defendant for the beneficial interest of the plaintiff. In an earlier suit — Originating Summons No 24–46–92 ('the earlier suit') — it was held that the plaintiff had no interest over two pieces of the land ('the two lots'). As a result, the plaintiff withdrew the prayers against the two lots. The defendant, in the earlier suit, apart from touching on the two relevant lots, had also explained her position vis-a-vis the other four unconnected lots ('the four lots'). The defendant's explanation was not denied by the plaintiff. The defendant raised a preliminary objection, submitting that as the plaintiff was presumed to acquiesce to her assertion by his non-reply or denial, the court ought to invoke the principle of res judicata on the plaintiff's claim of the four lots.

Held, dismissing the preliminary objection:

(1) Issues which might have been and which were not brought forward before the court in a previous proceeding, either deliberately or due to negligence or inadvertence, though not actually decided by that court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum. The court is subject to this broader view by reason of the principle of stare decisis. To put into effect the principle of res judicata, there must be a permissible situation which will enable it to be operative (see pp 391F–G and 392B–C); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed.

(2) To give judgment against the plaintiff over the four lots for not replying to the defendant's affidavit in the earlier suit when the lots were not even in issue and when the allegations were not sufficiently necessary or required to be replied would be outrageous and unfair. It would lead to penalizing the plaintiff for not having the foresight to anticipate the absorption of the broader view of the principle of res judicata. Further, if the broader principle of res judicata was applicable to the case, the outcome of the case would certainly have resulted in lopsidedness in the parties' present economic and financial position.

Also, from the notes of evidence and the notes of proceeding, it would appear that the earlier suit was geared towards the issue

of caveats and not on whether the plaintiff had actual or equitable rights over the land based on the limited material before the court. Similarly, the defeat suffered by the plaintiff did not result in the striking out of the main suit. Regarding the issue of interest in the main suit, the outcome would perhaps be at total variance with that application, as in a full trial a new set of rules applies whereby oral testimony may also be adduced. On the facts, the preliminary objection that the broader view of the principle of res judicata applied was dismissed (see pp 393B–F, I and 394A–B, H–I); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 followed.

[Bahasa Malaysia summary

Plaintif memulakan guaman sivil terhadap isterinya ('defendan') dan memohon suatu perisytiharan bahawa enam bidang tanah yang dipegang sesama antara mereka atau didaftarkan atas nama defendan sahaja dipegang atas amanah oleh defendan untuk kepentingan benefisial plaintif. Dalam guaman yang lebih awal — Saman Pemula No 24–46–92 ('guaman terdahulu') — ia diputuskan bahawa plaintif tidak mempunyai kepentingan dalam dua bidang tanah ('dua lot tersebut'). Akibatnya, plaintif menarik balik permohonan terhadap dua lot tersebut. Dalam guaman terdahulu, selain daripada menyebut dua lot tersebut yang berkenaan defendan juga telah menjelaskan kedudukannya tentang empat lot yang tidak berkaitan yang lain ('empat lot tersebut'). Penjelasan defendan tidak disangkal oleh plaintif. Defendan membangkitkan bantahan permulaan, dengan berhujah bahawa oleh kerana plaintif dianggap bersetuju kepada penegasannya disebabkan keengganan menjawab atau penyangkalan, mahkamah patut menggunakan prinsip res judicata atas tuntutan plaintif terhadap empat lot tersebut.

Diputuskan, menolak bantahan permulaan:

(1) Isu-isu yang mungkin dikemukakan dan yang tidak dikemukakan di mahkamah dalam prosiding yang lebih awal, sama ada dengan sengajanya atau disebabkan kecuaian atau kelalaian, walaupun tidak sebenarnya diputuskan oleh mahkamah itu, masih dirangkumi oleh doktrin res judicata, iaitu doktrin estopel per rem judicatum. Mahkamah adalah tertakluk kepada pandangan yang lebih luas ini disebabkan prinsip stare decisis. Bagi memberi kesan kepada prinsip res judicata, mestilah adanya keadaan yang membenarkannya berfungsi (lihat ms 391F–G dan 392B–C); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut.

(2) Penghakiman terhadap plaintif atas empat lot tersebut kerana tidak menjawab afidavit defendan dalam guaman terdahulu walaupun lot tersebut tidak menjadi isu dan pengataan tidak perlu secukupnya atau tidak perlu dijawab adalah melampau dan tidak adil. Ia akan membawa kepada penghukuman plaintif kerana dia gagal menjangkakan penyerapan pandangan res judicata yang

lebih luas. Selanjutnya, jika prinsip res judicata yang lebih luas adalah terpakai kepada kes, keputusannya tentunya akan menyebabkan ketidakseimbangan dalam kedudukan ekonomi dan kewangan pihak-pihak sekarang.

Juga, dari nota keterangan dan nota prosiding, ia kelihatan bahawa guaman terdahulu adalah terhadap isu kaveat dan bukan tentang sama ada plaintif mempunyai hak sebenar atau ekuiti atas tanah berdasarkan material yang terhad di hadapan mahkamah. Begitu juga, ketewasan yang dialami oleh plaintif tidak mengakibat dalam pembatalan guaman utama. Berhubung dengan isu kepentingan dalam guaman utama, keputusan mungkin akan bertentangan dengan permohonan itu, kerana dalam perbicaraan penuh suatu set kaedah terpakai di mana keterangan lisan boleh juga dikemukakan. Atas fakta, bantahan permulaan bahawa pandangan yang lebih luas prinsip res judicata adalah terpakai ditolak (lihat ms 393B–F, I dan 394A–B, H–I); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 diikut.]

Notes

For cases on issue estoppel, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2918–2923.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (folld)

Periasamy a/l Sinnappan v PP [1996] 2 MLJ 557 (refd)

Southern Finance Co Bhd v Saffron Sdn Bhd [1991] 3 CLJ 1867 (refd)

Wisma Sime Darby Sdn Bhd v Wilson Parking Malaysia Sdn Bhd [1996] 2 MLJ 81 (refd)

Legislation referred to

National Land Code 1965 s 372

Yau Jiok Hua (*Yau Jiok Hua & Co*) for the plaintiff.
Low Kiang Kiau (*Low & Lee*) for the defendant.

Cur Adv Vult

Suriyadi J: In gist, this was a civil suit brought by the ex-husband of the defendant for a declaration that six pieces of land held jointly between them or registered solely in the name of the defendant be declared to be held in trust by the defendant for the beneficial interest of the plaintiff. The five pieces of property are:

(i) Lot 619 HS (D) 207, also known as 119-J Taman Peringgit Jaya 75400 registered solely in the name of the defendant;

(ii) Lot 30 HS (M) 58/77, together with the building identified as 360-D Taman Bunga Raya Bukit Bruang, 75450 Melaka registered in their joint names;

(iii) Lot 153 at Section 1 Bandar Bukit Baru, Daerah Melaka Tengah, Melaka held under Grant No 4697 registered in their joint names;

(iv) Lot 154 at Section 1 Bandar Bukit Baru, Daerah Melaka Tengah, Melaka, held under Grant No 4698 registered in their joint names (a bungalow is now standing on lots 153 and 154);

(v) Lot 3704 HS (D) 2858, together with a building known as 789-B Taman Kerjasama Bukit Bruang, 75450 Melaka registered in the sole name of the defendant; and

(vi) Lot 3773 HS (D) 2924 Mukim Bukit Baru, Daerah Melaka Tengah, Melaka registered solely in the name of the defendant.

In open court whilst in the process of sorting out the arguments of both parties, the plaintiff withdrew the prayer against Lot 3704 HS (D) 2858 together with the building known as 789-B Taman Kerjasama Bukit Bruang, 75450 Melaka and Lot 3773 HS (D) 2924 Mukim Bukit Baru Daerah Melaka Tengah, Melaka. The reason for the withdrawal of the two lots in this civil suit is a direct consequence of the decision of Mohd Noor J in Originating Summons No 24–46–92. Mohd Noor J as per encl 28 p 336 in that case had declared that the plaintiff in this current case and the applicant in Originating Summons No 24–46–92 had no interest over Lots 3704 and 3773. There was no appeal against this decision; and pursuant to the finalization of that order, the plaintiff wisely withdrew the prayers against them. Despite the withdrawal of the two lots, the defendant was still left dissatisfied. She posed a preliminary objection over the rest of the properties, viz Lots 619, 30, 153 and 154 founded on the doctrine of res judicata.

I was initially surprised with this turn of events as Mohd Noor J in Originating Summons No 24–46–92 in that summons in chambers application had merely made a final order with regard to Lots 3704 and 3773 but never the other four. The learned counsel for the defendant, Mr Low Kiang Kiau brought my attention to the notes of proceeding as well as certain findings of facts made by the judge. The relevant notes of proceeding is found in encl 30 where the same counsel were recorded to have similarly represented their respective clients in that summons in chambers application. In support of his assertion of the doctrine of res judicata, Mr Low especially emphasized ground 3 of the findings of the court which reads:

> Apa yang nyata ialah pemohon tidak menafikan kemampuan penentang membeli harta-harta tersebut. Oleh yang demikian, atas imbangan keberangkalian, mahkamah berpuas hati penentang telah membeli harta-harta itu dari wangnya sendiri. Hakikat bahawa harta lain adalah atas nama isteri dan suami telah meyakinkan mahkamah atas keputusan ini.

Counsel relied largely on the last sentence in that finding, in that the issue regarding the four relevant lots had been discussed in detail, and if it was not already res judicata, it could be construed as res judicata bearing in mind the comprehensiveness of the hearing. Of course, in the process of

propping up the defendant's case he clinically identified relevant portions of the relevant affidavits as well as the notations made in the notes of proceeding. The legal basis of his argument of extending the concept of res judicata emanated from two case laws. He began with the case of *Southern Finance Co Bhd v Saffron Sdn Bhd* [1991] 3 CLJ 1867, where Lim Beng Choon J said at p 1870:

> Now there is a distinction between 'cause of action estoppel' which is the simplest estoppel *per rem judicatum* and 'issue estoppel'. In Spencer Bower and Turner *Res Judicata* (2nd Ed), it is stated at pp 150–151 that:
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> > 'Cause of action estoppel is applicable solely to the case where the same cause of action is alleged in successive proceedings. It is a reciprocal estoppel, and operates both as an estoppel *per rem judicatum* and conversely by way of merger. The maxim *transit in rem judicatum* prevents a successful plaintiff from re-asserting in a second proceeding the cause of action which he has already made the subject of a judgment in the first. This is the operation of the doctrine of merger. On the other hand the maxim *interest rei publicae sit finis litium* denies the unsuccessful defendant the opportunity of relitigating a case which he has already lost. This is estoppel *per rem judicatum* (and the case of plaintiff and defendant may be reversed when the opposite circumstances obtain). But where one cause of action has been the subject of final adjudication between parties, those determinations of particular issues which are its essential foundation, without which it could not stand, may be used as the basis of issue estoppels between the same parties when another cause of action altogether is set up.'
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> To support his statements, the learned author cited the following passage of Diplock LJ in *Thoday v Thoday* [1964] Law Reports 181 at p 198:
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> > 'The second species, which I will call "issue estoppel", is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.'
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> [The case of *Malayan United Finance Bhd v Noormurni Sdn Bhd & Anor* [1988] 1 CLJ 149 was also considered.]

Another case brought to my attention was *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at pp 197–198, where Peh Swee Chin FCJ said:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction,

A the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same B cause of action — *memo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

At pp 199–200, his Lordship further said:

On the other hand, the issue estoppel literally means simply an issue which C a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement D that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawdor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action E estoppel prevents reassertion of the cause of action'.

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and *not* to issues which might have been and which were not brought forward, either F deliberately or due to negligence or inadvertence, *while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata*, ie doctrine of estoppel per rem judicatum. (Emphasis added.)

G We are of the opinion that the aforesaid contrary view is to be preferred; it represents, for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the H question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement, ie '... every point which properly I belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> '... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'

It is especially that last sentence which was relied upon by the learned counsel, in that the facts adduced during the hearing of Originating Summons No 24–46–92 were sufficient to cover issues or facts which were part of the subject matter of the litigation and which could have been raised. Since I am subject to that broader view by reason of the principle of stare decisis — ie the principle of following previous cases — I cannot but seriously consider the preliminary objection (*Wisma Sime Darby Sdn Bhd v Wilson Parking Malaysia Sdn Bhd* [1996] 2 MLJ 81 and *Periasamy a/l Sinnappan v PP* [1996] 2 MLJ 557). To put into effect 'this second school of thought contrary view' (the term used by Peh Swee Chin FCJ), which I shall henceforth refer to as 'the broader view', there must be a permissible situation which will enable it to be operative. Without attempting to curb the applicability of this broader view, conversely it would be an exercise in futility to attempt to invoke the principle of res judicata if the facts do not warrant it.

Since currently there is not much legal material available to guide me to put into effect the application of the broader view of the Federal Court, I am left with no choice but to trudge on and improvise as I go along, so long as the improvisation is within the perimeters of the law. As a starting point, there must be sufficient evidence available in the notes of proceeding to enable me or any judge for that matter to arrive at a correct decision. For a perfect scenario of that kind to exist, I envisage the notes of proceeding of a full trial whereat not only admissible documentary evidence was tendered but the oral testimonies of witnesses have been recorded. In a not so perfect situation especially in trials where total dependence is on the affidavits, the presiding judge again will have to grope within the perimeters of the documents (as experienced by me).

For the current case, due to insufficient material as it was a summons in chambers matter inundated by conflicting evidence, my task of applying the broader view of res judicata was not made any easier. The wife, through her counsel, consistently impressed on me as to their poverty when they began their life together, but lost out substantially when they became estranged. By scrutinizing all the land grants of the controversial lots, I detected chinks in the defendant's assertion as for a fact I found her name to have been registered in all the grants either recorded as the sole owner (of three lots) or a joint owner of the other three.

The supporting affidavit (encl 28 p 6) of Chua Bah Bee for the ex parte summons in chambers highlighted down in detail the particulars of the properties bought by them when they were still under one roof. Why the other four properties were mentioned by the applicant when the summons in chambers targeted only Lots 3704 and 3773 is quite difficult for me to fathom. In response to this elucidation of the properties bought by them during the duration of their marriage, the respondent wife in her reply in the said Originating Summons No 24–46–92 — apart from touching on the two relevant lots — also explained her position vis-a-vis the other four unconnected lots. Unfortunately, the explanation of the wife was not denied by the applicant and this led Mohd Noor J to be convinced of her entitlement over the two lots. Why the applicant failed to deny vide an affidavit-in-reply is also a mystery but currently, due to the lack of that response, Mr Low for the respondent wants me to invoke the principle of

A res judicata over the four lots in the light of the non-rebuttal as to how she obtained those properties. It is legally sound to give judgment against the husband for not replying to the wife's affidavit in Originating Summons No 24–46–92 as he was presumed to acquiesce to her assertion by his non-reply or denial. To equate the outcome regarding the other four lots on the same footing when they were not in issue and not sufficiently necessary or
B required to be replied would be outrageous to our sense of fair play. As experience has shown, it is not uncommon for contending parties to be satisfied with specific replies to specific allegations whilst leaving many other issues untouched on the then correct view that it was unnecessary to reply. The shock wave will only be felt later when the broader view of the
C principle of res judicata is applied when the future presiding judge decides to adjudge the supposed previously unnecessary issues as res judicata. For the purposes of our case, I was not inclined to apply the broader principle of res judicata as it would lead to penalizing the husband for not having the foresight to anticipate the absorption of the contrary view of the principle of res judicata. Had he been able to predict the expansion of the law towards
D the present direction, he would have probably replied accordingly and come out with a reasonable and logical answer.

Whilst the proceeding was in session, I mentally observed the striking contrast between the two personalities involved. The ex husband spoke absolutely no English but was inclined to speak in Bahasa Malaysia (the
E Indonesian version) whilst the wife appeared sophisticated and spoke very good English though not in control of her emotions. I also took note, as mentioned above, of what the lady stressed that when they were initially married they were poverty-stricken resulting in them migrating to another country in search of employment so as to improve their lot. If I had agreed
F with what was ventilated by Mr Low, ie that the broader principle of res judicata was applicable to the case, the outcome of the case would certainly have resulted in lopsidedness in their present economic and financial position. It would have meant that out of the six pieces of land, three lots would belong to her completely, with the other three to be held under their joint names. Surely for two persons who started with nothing financially,
G such an outcome would smack of unfairness especially on the flimsy and unreasonable ground that no reply was forthcoming from him in Originating Summons No 24–46–92 when Lots 619, 30, 153 and 154 were not in issue and not required to be replied.

The matter that arose out of that summons in chambers in Originating
H Summons No 24–46–92 related to an application to extend the caveat in Lots 3704 and 3773 pending the disposal of the main suit. It began with an ex parte originating summons which became inter partes in the process. In support of his application, the caveator husband had stated grounds for the extension of the caveat. For the applicant there to succeed, he had to show that he had a caveatable interest in the land in question, that there
I was a serious question to be tried and that the balance of convenience or balance of justice was in favour of maintaining the caveat pending the disposal of the main suit (s 372 of the National Land Code 1965). From the notes of evidence and the notes of proceeding, it would appear that the applicant husband lost out on the issue of caveatable interest as required by the National Land Code 1965. It must be borne in mind also that the

decision was geared towards the issue of caveats and not on whether the applicant had actual or equitable rights over the land based on the limited material before the court. Similarly, the defeat suffered by the applicant did not result in the striking out of the main suit. Regarding the issue of interest in the main suit, the outcome would perhaps be at total variance with that application, as in a full trial a new set of rules applies whereby oral testimony may also be adduced. I am reminded of the case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 where Edgar Joseph Jr J (as he then was) said at p 93:

> The true test of res judicata in its wider sense or issue estoppel may be stated thus: has there been a final determination of the issue? That is the crucial factor. The authorities show that for a determination there must be a final adjudication by the court: *Langmead v Maple* (1865) 18 CBNS 255. There must be a final and not an interlocutory order: *Huntley (Marchioness) v Gaskell* [1905] 2 Ch 656 and *Bozson v Altrincham Urban District Council* [1903] 1 KB 547.
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> Secondly, it is also trite law that the hearing of an application for an interlocutory injunction is not a trial on the merits. This is understandable for in such proceedings there is usually no oral evidence and no opportunity for cross-examination. Nor, for that matter, would there have been the full pre-trial process of discovery and inspection of documents at that stage. The relevant criteria applicable must, of necessity, be materially different as compared to that applicable to the trial of an action since at the interlocutory stage neither party's case can be said to be 'proved'. Having said that, it is true to say, as Lord Denning pointed out in *Fellowes v Fisher* [1976] QB 122 at p 129G:
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> > 'Nearly always, however, these cases do not go to trial. The parties accept the prima facie view of the court or settle the case. At any rate, in 99 cases out of 100 it goes no further.'

To summarize, to bring myself within the ambit of the broader view of res judicata, I adopted these guidelines:

(i) there must be sufficient facts and evidence before me;

(ii) notes of proceeding from a full trial would present the ideal records;

(iii) even if the records of the notes of proceeding reflected an affidavit based trial and no reply was submitted by parties, that should not pose a hindrance to me so long as the outcome would still be the same regardless whether an affidavit in reply was or was not filed; and

(iv) the result would be final and interlocutory in nature.

After having considered all the above factors, I dismissed the preliminary objection of the learned counsel for the defendant that the broader view of the principle of res judicata applied to Lots 619, 30, 153 and 154.

Preliminary objection dismissed.

Reported by Loo Lai Mee